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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 278

AARON D. FRANK,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE CRIMINAL COURT OF BALTIMORE
(MARYLAND)

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

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see inside front cover

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BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Interest of Amici Curiae

The National Institute of Municipal Law Officers (NIMLO) is an organization composed of more than eleven hundred municipalities located in each of the 49 states, the District of Columbia, and the territories of Hawaii and Puerto Rico. Each member city acts through its chief

legal officer, known variously as City Attorney, City Solicitor, Corporation Counsel, Director of Law, etc.

This brief is filed pursuant to rule 42(4) of this Court. The members of NIMLO are political subdivisions of states, and this brief is sponsored by their authorized law officers.

The issue presented in this case is of vital interest not only to the city of Baltimore but to all municipalities which seek to prevent health and fire hazards and exercise other necessary police power functions under ordinances providing for reasonable inspections of private houses. The issue is also of vital interest to the millions of inhabitants of those municipalities whose life and health and property are protected by such inspections.

The members of NIMLO were represented by brief *amici curiae* and also in oral argument in the only other case presenting to this Court the issue of the constitutionality of municipal health inspection, *i.e., District of Columbia* v. *Little*, 399 U.S. 1 (constitutional issue not decided). It is because of the collective experience of the NIMLO municipalities with the necessity for reasonable inspection ordinances, and their awareness of the danger which is posed to the health and welfare of their respective communities by attempts such as this to invalidate those ordinances, that this brief *amici curiae* is filed.

Summary of Argument

The rights guaranteed by the Constitution are not absolute. In the case of the right to privacy under the Fourth Amendment, only *unreasonable* searches are prohibited. Whether a search is or is not "unreasonable" depends upon a balancing of all interests for and against allowing the search. In this case, the interest of all the people in guarding the public health and preventing the spread of

disease outweighs the interest of the individual householder in being free from the slight inconvenience caused by reasonable municipal health inspection. Health inspections are not unreasonable searches within the meaning of the fourth amendment.

ARGUMENT

I. Fourth Amendment Prohibits Only Searches Determined To Be Unreasonable After Consideration of All Interests

The freedoms of the Bill of Rights are not absolute. They are subject to reasonable limitations in the exercise of the police power of the state. *American Communications Asso.* v. *Douds*, 339 U.S. 382, 398-99. This Court has said:

> We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.' *Id.* at 399.

Moreover, the guarantee of individual freedom in the Fourth Amendment is by its language specifically qualified. It is not an absolute prohibition on searches of houses. It prohibits only "*unreasonable* searches." (Emphasis added.)

As pointed out in appellee's brief, *Br.* p. 20, and indeed in appellant's brief as well, *Br.* p. 29, the determination of whether health inspection under the Baltimore ordinance was an *unreasonable* search within the meaning of the Fourth Amendment will depend upon a balancing of interests between the right of an individual to privacy in his own home and the right of a municipality to guard the

health and welfare of all its people through the exercise of its police power. It is to this balancing of interests that the *amici curiae* wish to direct their argument. Because of the collective experience of the more than eleven hundred NIMLO member cities all over the nation in fire prevention and sanitation, the *amici curiae* feel particularly qualified to bring to the attention of this Court the gravity and importance of the public interest in the preservation of reasonable inspection ordinances.

II. Public Interest in Preservation of Health Inspections

Sanitary inspections cannot be made from a courthouse. It is not a question primarily of the inconvenience involved in procuring a warrant every time there is a complaint as to unsanitary conditions. The fact is that public health cannot be protected merely by following up warrantable complaints. The major public health and safety programs in this country are grounded on the concept that it is through prevention of conditions which result in health and safety hazards, and not in the punishment of violators, that the public welfare is best protected.

A reversal of the decision of the state court in this case would destroy the systems of preventive inspections now set up all over this country, and would make health officers mere process servers for the purpose of abating conditions which have already grown to the stature of public menace. Effective health and safety administration is not based upon complaints, but is the result of periodic scientific checks by trained inspectors to determine health and safety conditions. This is amply illustrated by the results of a test survey conducted by a grand jury in New York City convened to investigate hazardous and unsanitary conditions in housing. Surveyed by an inspection team were fifteen square blocks of housing in three representative

areas of Brooklyn, in which 567 housing division violations had been previously reported on complaint. The inspection survey revealed an actual total of 12,445 violations in the test area, many of them classed as "hazardous." Moreover, other New York City inspections indicated that this ratio was not out of line. GRAND JURY PRESENTMENT, "In the Matter of the Investigation of the Enforcement of Any and All Laws Concerning Hazardous and Unsanitary Conditions in Dwellings, etc.," Kings County Court, N.Y., pt. 1, pp. 6-8 (Jan. 28, 1953).

Only 567 violations on file prior to the test inspection as against 12,445 violations after the test! Can there be any doubt of the need for preventive inspections?

Interior inspections of private housing for fire hazards are regularly conducted in Baltimore under article 5, chapter 12 of that city's General Building Code. Similar programs of preventive inspection in countless other cities have drastically reduced fire hazards in this country. These inspections have been part of a scientific plan to educate the householder into avoiding catastrophe rather than confining municipal efforts to extinguishing fires after they have occurred.

There is the same need for inspection in connection with garbage and rodent nests, two of the greatest sources of the spread of disease in this country. If the health officers of all the cities of the country are to wait for the complaints of neighbors and then issue warrants predicated upon the information received, the effective work that is being done in preventing epidemics in this country will henceforth be curbed. For every neighbor who complains, there are hundreds who are unwilling to become involved in a backyard fight to preserve the health of the community, others who are phlegmatic to the danger, and still others who are joint offenders.

The annual report of the health department of the city of Cleveland for the year 1956 shows that in that city 36,081 housing sanitation inspections were made in a single year. The report of the health department of the city of Boston shows that in the same year 27,268 sanitation inspections were made in that city. In Detroit, according to the annual report of the department of health, 25,247 housing inspections were made in 1955. Municipalities maintain these inspection programs because their people feel they are necessary to protect the general health.

The municipalities of this nation spend $432,000,000 annually in refuse collection and removal. DEPT. COMM. BUR. CENSUS REP., "Summary of Governmental Finances," p. 30 (Aug. 24, 1958). It is not just the zeal to render a public service that impels cities to maintain these costly refuse removal systems. It is the recognition of the fact that the control of garbage is the primary step in the control of certain very serious diseases. For example, the danger of typhus, where the infection results from the bites of insects borne by rats, is tremendously increased where the garbage sanitation is not adequately controlled. The same danger exists where sanitation officers are not allowed to inspect dwellings such as appellant's for rodent infestation and other health hazards.

Possible rodent infestation in appellant's house is not appellant's business alone. Rats do not stay at home, nor do the disease germs which they spread. Fires ignited by safety hazards which might have been uncovered by municipal inspection spread to adjoining houses, and have been known to level entire city blocks. A man's home may be his castle, but that castle no longer sits on a hill surrounded by a moat. The modern "castle" is connected to a central water system, a sewage system, a garbage collection system, and frequently to the houses on either side.

The case of the open garbage can may not be as intriguing to students of constitutional law as a case involving freedom of speech and assembly, but the assemblage of rodents and germs can have equally far reaching effect. A colony of rats is capable of increasing at the rate of six percent per day. One germ, after thirty divisions, becomes one billion germs—a formidable armed enemy. This is not fanciful, but realistic. To municipal officers, in constant touch with health and safety problems, it is impossible to shrug off the very real dangers that lurk in the everyday problems of sanitation.

The practical administrative obstacles to operating inspection systems through warrants cannot be urged too strongly. It just cannot be done that way. Getting a warrant would be possible only in that portion of cases where complaints have been received or where a nuisance situation has reached the point where it can be seen and smelled from outside the building. Olfactory health control is no answer to the major health problems of this country. The violations that smell represent too small a portion of the whole. By the time putrefaction sets in, very valuable time has been lost and an emergency phase has begun. The whole public health program is predicated upon the basic principle that improper practices must be corrected and abated *before* they reach the stage of glaring danger.

If health inspection ordinances are invalidated, countless cases of defective household plumbing which inspections would discover will be permitted to continue uncorrected. Defective plumbing may cause back siphonage of sewage and other household wastes into the public water supply. The amoebic dysentery epidemic in Chicago in 1933, resulting in 100 deaths in over 1,000 known cases, was caused by just such a situation. *Amoebic Dysentery in Chicago*, 24 Am. J. Pub. Health 756 (1934). Water is

also a vehicle for the dreaded diseases of cholera and typhoid fever.

A logical extension of the invalidation of health inspection ordinances would prevent the effective checking of electrical work for fire hazards, or of hot air furnaces to determine whether proper combustion is achieved so as to prevent the escape of noxious gases. It is worth noting that about two years after the attempted inspection in *District of Columbia* v. *Little*, 339 U.S. 1, a fire gutted the home of the respondent and burned to death her two-year-old child. Washington Star, Aug. 6, 1949, p. A-20, col. 1; Aug. 7, 1949, p. A-7, col. 7. While the cause of the fire was reported as undetermined, the incident serves as a grim reminder of the kind of loss that can frequently be prevented by municipal inspection.

Field inspections also play a vital role in urban redevelopment and slum clearance. D. C. Dept. Licenses & Inspections Rep., "Housing Code Enforcement" (Dec. 24, 1958). Federal government statistics show that slums, which constitute only 20% of the total residential area of the average American city, produce 35% of all fires, 45% of major crimes, and 50% of disease. *Id.* at 23. In the landmark case of *Berman* v. *Parker*, 348 U.S. 26, 32, this Court recognized that:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost intolerable burden.

III. Interest of Individual Householder In Absolute Privacy

The "reasonableness" of the search involved in this case depends upon a balancing of interests. It has been shown that the interest of the people—acting through

their agents, municipalities—in exercising police power through health and safety inspections is grave indeed. What are the interests of the individual householder in maintaining an absolute right of privacy in his home against such inspections?

It should be noted initially that most householders feel their interests lie in permitting such inspections, and welcome the periodic visits of municipal inspectors which they know can uncover hazards the correction of which may save their lives by stopping fire or disease. Yet what of a householder who, like appellant, feels differently? What are the dangers to such a householder if inspection is allowed?

Unlike the householders in *all* cases in this Court where searches have been declared unconstitutional, this householder is subject to no criminal prosecution. The inspecting official is not looking for evidence of a crime. Under the Baltimore city code, as under most inspection ordinances, if a health or safety hazard is found, the householder is merely notified to correct it and a penalty attaches only if he fails to comply. BALTIMORE, MD., HEALTH CODE, §§ 112, 114-15, *R.* p. 104. The result of the inspection is not that defendant is convicted of a crime because of discovered evidence, but that an unsafe condition in his home is corrected.

But what of the nuisance to the householder caused by inspections? There is no contention in the instant case that the householder was harrassed by repeated inspections, nor that the inspection in question was made at an inconvenient time of the day. Indeed, the ordinance under attack required that the inspection be made in the day time, and the particular inspection under attack was attempted to be made in the middle of the afternoon. There is no contention in the instant case that the inspect-

ing sanitarian had any motive other than the discovery of a possible health hazard. This is not the case of the knock on the door in the middle of the night, or even of interference with the family dinner hour. The rule of reasonableness which has been developed in cases passing upon due process of law (and which is specifically incorporated in the language of the Fourth Amendment forbidding only *unreasonable* searches) is always a protection against the capricious action of government officials. It cannot be doubted that abuses of the health and safety inspection ordinances could be remedied if they should transpire.

IV. Balancing of Interests

When the interests are balanced, then, the scales are grossly uneven. In order to preserve the nebulous private right of the appellant and a few others like him, this Court is asked to jeopardize the lives and health of millions of city residents the nation over. One death from fire or disease originating in a filth strewn cellar should be sufficient to tip the scales, but in fact thousands of such deaths are a realistic possibility.

It is not to be denied that the fundamental purpose of the Fourth Amendment was to secure privacy in the home. However, it must also be remembered that under the police power there is lawful interference in many instances with the liberty of individuals, their right to move around and their right to use their property. Individual freedom must yield in some cases to the enforcement of reasonable regulations for the public welfare. The right of privacy in the home should not give the right to refuse entry to a health inspector any more than the right of free speech gives the right falsely to shout "fire" in a theater, *Schenck v. United States*, 249 U.S. 47, 52, or the right of freedom

of religion gives the right to offer a human sacrifice, *Reynolds* v. *United States,* 98 U.S. 145, 166.

Where public health is at stake, this Court has sanctioned, as against constitutional objection based on individual rights, the power of the government summarily to enter premises and seize and destroy putrid food, *North American Cold Storage Co.* v. *Chicago,* 211 U.S. 306, and the power to provide for compulsory vaccination, *Jacobson* v. *Massachusetts,* 197 U.S. 11. Indeed, in affirming the power of a municipality to regulate refuse removal, this Court in *California Reduction Co.* v. *Sanitary Reduction Works,* 199 U.S. 306 has noted *obiter* the very issue involved in this case:

> The householder may be compelled to submit even to an *inspection of his premises,* at his own expense, and forbidden to keep them [garbage and refuse material], or allow them to be kept, in such condition as to create disease. *Id.* at 321-22 (Emphasis added.)

Conclusion

No one who loves America and the freedom for which America stands wants to see any of the individual rights guaranteed by the Constitution weakened in any way. This brief is not submitted with a desire to weaken individual rights, but in an attempt to put our constitutionally guaranteed rights in a proper perspective. It is earnestly submitted that it was never the intended purpose of the Fourth Amendment to prevent reasonable health inspections, and it should not be expanded to that point. It has been the vigilance of public health officers and their well-integrated programs that have saved this country from some of the epidemics, scourges and health menaces that would inevitably have occurred. To confine health inspections to instances where there is cause for issuance of a warrant

would be to deal a crippling blow to these sanitation programs. The decision of the court below should be affirmed.

Respectfully submitted,

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